NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK FASI,
Plaintiff-Appellant

v.

GANNETT COMPANY; LIBERTY NEWSPAPERS; PHILLIPS MEDIA SERVICES; and RUPERT PHILLIPS,
Defendants-Appellees

Appeal from the United States District Court
for the District of Hawaii
David A. Ezra, District Judge, Presiding

Argued and submitted May 6, 1997
Honolulu, Hawaii

MEMORANDUM*

No. 96-15129

D.C. No. CV-95-00585-DAE

Filed May 27, 1997

Cathy A. Catterson, Clerk
U.S. Court of Appeals

Received May 30, 1997

Before: NORRIS, HALL, and TASHIMA, Circuit Judges.

Plaintiff Frank Fasi appeals from the district court's judgment granting defendants' motion to dismiss pursuant

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

to Fed.R.Civ.Pro. 12(b)(6). We have jurisdiction, 28 U.S.C. § 1291, and we AFFIRM.

Before reaching any question of state law, this court must determine whether the speech in question is protected by the First Amendment. *See Masson v. New Yorker Magazine*, 501 U.S. 496, 510 (1991). Because Fasi, as mayor of Honolulu, was a public figure at the time of the article, he has the burden to show both falsity and "actual malice." *New York Times v. Sullivan*, 376 U.S. 254, 268-70 (1964).

The First Amendment protects statements if they express an author's opinion and that opinion does not imply a false assertion of fact. *E.g., Partington v. Bugliosi*, 56 F.3d 1147, 1153 (9th Cir. 1995). In its First Amendment analysis, this court considers the general tenor of the work, the defendants' language in the article, and whether the statements are capable of being proved true or false. *Id.* A review of the editorial at hand shows that the First Amendment protects the article.

The title, "Blackmail Incorporated," is a play on the phrase "murder incorporated." The term "extortionist" is placed in quotation marks, and the word blackmail is used in the context of "legalized blackmail." The First Amendment protects the "rhetorical hyperbole" and "imaginative expression" that authors use to enliven their prose. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990). The fact that the rhetoric defendants used, in *other* contexts, could refer to factual assertions of criminal behavior is insufficient to defeat constitutional protection here. *See Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 5, 13 (1970). *Greenbelt* makes clear that the words extortion and blackmail must be viewed in the context of the article to determine their meaning.

The context of the article reveals that the phrases extortion and blackmail are rhetorical and refer to the zoning

controversy. The First Amendment protects statements when "an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions." *Partington*, 56 F.3d at 1156-57. Here, the article outlines Fasi's controversial zoning proposal, comments on the inappropriateness of Fasi's behavior, and opines that Hawaii residents will be harmed. The colorful language in question, including the words "extortion" and "blackmail," describes a public official's actions and offers a harsh criticism of those actions. Such speech falls clearly within the First Amendment's protection.

No reasonable mind, in the context of the entire editorial, could have taken the article to accuse Fasi of the literal crimes of extortion and blackmail; as such, the speech is protected. *See Underwager v. Channel 9 Australia*, 69 F.3d 361, 367 (9th Cir. 1995). The district court's dismissal of the action is AFFIRMED.